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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 609

AERONAUTICAL RADIO, INC., ET AL., *Petitioners*,

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The Solicitor General's brief in opposition to the petition for certiorari, like the opinion of the court below, glosses over the real import of this case which clearly presents unique and substantial issues warranting review by this Court.

The brief ignores Section 140's unprecedented status as a delegation of revenue raising authority to all

unnamed government agencies.[1] It overlooks the fact that, of the hundreds of government agencies potentially subject to Section 140, the FCC is the first and only one to adopt a comprehensive schedule of fees under Section 140's claimed authority.[2] And it totally fails to come to grips with the basic problem of how the FCC's action—and all future agency revenue raising actions—may be effectively checked or controlled in light of Section 140's vague standards as implemented by the FCC and ratified by the Court of Appeals.

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[1] Contrary to the brief in opposition (p. 7, n. 4), statutes authorizing courts to fix and collect fees furnish no analogy to Section 140. In sharp contrast to Section 140's blanket delegation, the statutes cited by the Solicitor General are *specific* delegations by duly considered legislation to specific bodies to fix and collect docketing fees for specific functions with which Congress was fully versed. Indeed, Congress itself specifically designated the amount of certain fees to be collected by District Courts. 28 U.S.C. §§ 1914, 1923. Actually, in light of this country's common law background, *no* statutory authority may be required to enable *courts* to collect filing fees. In any event, Congress at no time has ever broadly directed the Judiciary to make itself "self-sustaining" through filing fees.

[2] There is no basis for innuendo (Br. pp. 4-5) that the FCC followed the lead of the SEC, Immigration and Naturalization Service, Department of Defense, or FAA, in establishing its charges. The FAA charges (14 C.F.R. § 187) are for furnishing copies of documents. The Department of Defense regulations (32 C.F.R. § 288) impose charges principally for furnishing documents, copies, or searching. The Immigration and Naturalization Service fees (8 C.F.R. § 103.7(c)) merely supplement various filing fees already authorized by statute. 8 U.S.C. § 1351. In the absence of any citation, either in the record or in the brief in opposition, it is not clear what SEC fees the FCC may have claimed to rely on. Filing fees for registration statements are *specifically provided for by statute*, 15 U.S.C. § 77f, and the applicable regulation, 17 C.F.R. § 230.457, simply provides a method for calculating the statutorily prescribed fee.

Above all, the brief in opposition overlooks the synergistic effect of the multiple delinquencies in the Congressional and agency law-making base for this revenue raising impost.

The brief in opposition (p. 5) notwithstanding, "delegations of authority of the kind employed by 5 U.S.C. 140" have *not* "uniformly been held constitutional" for the simple reason that *no* such blanket delegation of revenue raising authority, which unnamed government agencies may exercise or not as they choose, has ever been attempted. Without exception, the cases cited in the Solicitor General's brief (pp. 6-7)[3] involved delegations to *specific* high level administrators to make decisions based on stated criteria in *particular designated fields*. Indeed, this court has suggested that proper performance of the "legislative function" *requires* that *Congress* specify "the basic conclusions of fact upon ascertainment of which, from relevant data by a *designated administrative agency*, it *ordains that its statutory command is to be effective.*" *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U.S. 126, 145 (1941) (emphasis added).

Moreover, no previous delegation approved by this court was enacted as a legislative rider on an appropriations bill.[4] Passage of legislation in this fashion ren-

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[3] *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604 (1950); *Yakus* v. *United States*, 321 U.S. 414 (1944); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

[4] House of Representatives Rule XXI, § 2, provides that no "*provision in* any such [appropriations] bill or amendment thereto changing existing law" shall be in order (See Pet. p. 21a), refuting any suggestion (Br. p. 8) that § 140's passage was proper because the Independent Offices Appropriations Act of 1952, like any other appropriations bill, originated in the House, rather than the Senate.

ders any talk of Congressional intent a farce, and frustrates any search for legislative background to give meaning to Section 140's vague standards.[5]

Finally, the Court of Appeals' approval of the FCC's action simply confirms in the FCC—and in any other federal agency—the uncontrolled discretion to impose charges of whatever amount for whatever purpose subject to no effective control by any of the three major branches of government. For if, as the brief in opposition suggests (p. 9), the FCC's juggling of the amounts of fees, its belatedly presented "cost study," and its arbitrary inclusions and exemptions from its fee schedule[6] satisfy traditional principles governing administrative action pursuant to delegated authority, this can only occur because Section 140 itself is so vague that it means whatever an agency chooses to make it mean in any particular case.

In short, where, as here, the phrase, "fair and equitable" is asserted to encompass within its range of reasonableness fees recovering as little as 8% and as

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[5] Cf. *Lichter* v. *United States*, 334 U.S. 742, 783-87 (1948) (Congress' "well considered judgment" against specific factual background validates Renegotiation Act). In *this* case, however, even the sponsor of § 140 was apparently confused as to the "factual background," and, in any event, the FCC's action here has totally failed to accomplish *his* stated purpose to compel broadcasters to "pay some of the costs of the hearings" generated by their licensing proceedings. See Pet. pp. 16a-17a.

[6] To use an example from the brief in opposition, "organizations such as hospitals, which 'use radio essentially for public safety purposes', were exempted" (Br. p. 4). Yet at no time has the FCC adequately explained its simultaneous decision not to exempt stations in the aviation service governed by 47 C.F.R. § 87.123 which restricts their transmissions to "communications for the safe, expeditious, and economical operation of aircraft and the protection of life and property in the air. . . ."

high as 72% of applicable costs from contemporaneous applicants, this claimed Congressional standard (Br. p. 6) consists only of empty words, without meaning in evaluating this or any other future agency revenue raising action.

The essential point of this case is simply this: to allow the present FCC fee schedule to stand on the claimed authority of the 1951 rider and the Court of Appeals' permissive and broad opinion will be the first and irreversible step toward a significant departure in our system of government. Whether the Constitution permits uncheckable agency revenue raising action, based on a Congressional pronouncement of questionable origin, unprecedented scope, and uncertain content, is a substantial question, warranting full and deliberate review by this Court.

Respectfully submitted,

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December 2, 1964